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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY, MAGISTRATE JUDGE

WAYMO LLC,)	
)	
Plaintiff,)	
)	
VS.)	No. C 17-0939 WHA
)	
UBER TECHNOLOGIES, INC.;)	
OTTOMOTTO LLC; OTTO TRUCKING)	
LLC,)	
)	
Defendants.)	
_____)	San Francisco, California
		Wednesday, August 9, 2017

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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Official Reporter - U.S. District Court

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BY: JONATHAN ALAN PATCHEN, ESQUIRE

1 Wednesday, August 9, 2017

9:10 a.m.

2 **P-R-O-C-E-E-D-I-N-G-S**

3 **---000---**

4 **THE CLERK:** Calling Civil 17-939 WHA, Waymo versus
5 Uber Technology.

6 Counsel, please state your appearances.

7 **MR. VERHOEVEN:** Good morning, Your Honor. Charles
8 Verhoeven, and with me is James Judah, on behalf of Waymo.

9 **THE COURT:** Good morning.

10 **MS. DUNN:** Good morning, Your Honor. Karen Dunn and
11 Ed Takashima for Uber and Ottomotto.

12 **THE COURT:** Good morning.

13 **MS. WALSH:** Rachel Walsh on behalf of defendant Otto
14 Trucking.

15 **THE COURT:** All right. But I don't have an Otto
16 Trucking motion pending.

17 **MS. WALSH:** That's correct.

18 **MR. PATCHEN:** Good morning, Your Honor. Jonathan
19 Patchen, of Taylor & Patchen, on behalf of non-party Lior Ron.

20 **THE COURT:** And I don't have a Ron motion pending.

21 **MR. PATCHEN:** I believe you do, Your Honor.

22 **THE COURT:** What motion would that be?

23 **MS. DUNN:** Mr. Ron's motion to quash portions of the
24 Stroz subpoena.

25 **THE COURT:** Right. But I spoke to Mr. Cooper about

1 that. It was just there. There's no opposition.

2 Have you met and conferred with Mr. Cooper?

3 **MR. PATCHEN:** We have not.

4 **THE COURT:** Okay. So that's what you need to do.

5 **MR. PATCHEN:** There has been an opposition filed
6 though, as well, Your Honor.

7 **THE COURT:** Well, when?

8 **MR. PATCHEN:** It was filed --

9 **THE COURT:** I'm not prepared to address it.

10 **MR. PATCHEN:** Okay.

11 **THE COURT:** It wasn't done through Mr. Cooper.

12 **MR. PATCHEN:** The opposition was filed on July 13th.

13 **THE COURT:** Yeah. You see I address things, like,
14 right away.

15 **MR. PATCHEN:** Okay.

16 **THE COURT:** So it needs to go through Mr. Cooper.
17 That's obviously a matter that can get resolved through
18 Mr. Cooper.

19 **MR. PATCHEN:** I hope so, Your Honor.

20 **THE COURT:** Is Mr. Cooper here? Oh, he's not here.

21 In any event, what I'd like you to do is, after court
22 today contact Mr. Cooper.

23 **MR. PATCHEN:** Sure.

24 **THE COURT:** And I'm sure that it can be worked out.
25 That's a matter that can be worked out.

1 **MR. PATCHEN:** I hope so, Your Honor. Thank you.

2 **THE COURT:** Okay. All right. You can come forward.

3 And Ms. Dunn.

4 So I guess my first -- this is the motion with respect to
5 Mr. Kalanick's deposition. And my question to Waymo -- so,
6 really, we're talking about this conversation between
7 Ms. Padilla, the head of litigation, Mr. Levandowski and
8 Mr. Kalanick.

9 Is it Waymo's position that that conversation was
10 privileged or not privileged?

11 **MR. VERHOEVEN:** The -- the -- they previously asserted
12 it was privileged, and then they selectively waived it.

13 **THE COURT:** I understand that.

14 **MR. VERHOEVEN:** Okay.

15 **THE COURT:** So is it your position, though, that that
16 conversation is privileged?

17 **MR. VERHOEVEN:** Before it was waived, yes.

18 **THE COURT:** Is privileged. Okay.

19 All right. So, Ms. Dunn.

20 **MS. DUNN:** Yes.

21 **THE COURT:** Why is it not privileged?

22 **MS. DUNN:** It's not privileged because the only
23 testimony about this meeting is what Mr. Kalanick said
24 Mr. Levandowski --

25 **THE COURT:** No, no, not what the testimony was. Why

1 is the conversation -- Ms. Padilla, the head of litigation, has
2 a meeting with Mr. Levandowski and Mr. Kalanick in which
3 they're discussing the facts relevant to and about the
4 litigation.

5 If Mr. Levandowski had said, "I took that information to
6 Uber," you would be arguing in a heartbeat that that
7 conversation was privileged. And don't even try to tell me
8 that you would not.

9 The fact that you're now claiming it was never privileged
10 is, I'm just going to tell you candidly, astounding.

11 What was Ms. Padilla doing there?

12 **MS. DUNN:** Ms. Padilla explains this in her
13 declaration.

14 **THE COURT:** She doesn't say anything about what she
15 was doing there. Why was she in that conversation?

16 **MS. DUNN:** She was present for the conversation.

17 **THE COURT:** Why? Why? She's the head of litigation.
18 They're having all these meetings because they have learned
19 now, they knew that Judge Alsup is going to make the fact that
20 Mr. Levandowski is pleading the Fifth public. What are the
21 implications, she says, for the litigation.

22 They have a meeting. That one is privileged. She
23 immediately goes into this other meeting with Mr. Levandowski
24 and Mr. Kalanick. She's there. Why is the head of Uber's
25 litigation in that meeting?

1 **MS. DUNN:** She was there not --

2 **THE COURT:** To do what?

3 You can't answer because, of course, she was there as
4 Uber's in-house counsel. Of course. It's okay. You can't
5 answer.

6 I don't know, have you seen *Flubber*; right? I think
7 that's Robin Williams' best movie, if you have kids; right?
8 They watch and they laugh hysterically. And the stretch,
9 right, the *Flubber* stretches for miles.

10 "This argument is not privileged" is bigger than that
11 stretch.

12 **MS. DUNN:** Your Honor, respectfully, if I may, I
13 disagree.

14 **THE COURT:** Give me a case. Can you even give me a
15 case with facts even remotely close to this, where the head of
16 litigation is sitting there talking to the two parties
17 intimately involved about the facts relevant to the litigation
18 and it's not privileged? What case?

19 **MS. DUNN:** The purpose -- the purpose of this meeting
20 was for Mr. Kalanick to ask Mr. Levandowski what had happened.

21 **THE COURT:** Okay. Then --

22 **MS. DUNN:** To press him for information.

23 **THE COURT:** Why was Ms. Padilla there?

24 **MS. DUNN:** Ms. Padilla is in many meetings at Uber.

25 **THE COURT:** You're not answering my question. Why was

1 she there?

2 **MS. DUNN:** She -- I can tell you from my own personal
3 knowledge, she is present at many meetings. Some of them are
4 privileged and some of them are not.

5 **THE COURT:** Yes. Whenever you want it to be
6 privileged, it's privileged. And when you don't, it's not.
7 That's what it looks like, Ms. Dunn. That's what it looks like
8 in spades.

9 Why was Ms. Padilla at that meeting? Why was she there?
10 Is she good friends with Mr. Levandowski? Why was she there?

11 **MS. DUNN:** Well, one thing is, she is a person of
12 comfort to the CEO, Mr. Kalanick. So it is -- it makes
13 complete sense to me. And I understand Your Honor does not
14 like our argument right off the bat --

15 **THE COURT:** It's not that I don't like it. And Uber
16 should be very careful because now I think we have to go back
17 and look through that privilege log and see everywhere where
18 Ms. Padilla is there. Because, apparently, Ms. Padilla, even
19 though she's the head of litigation, often she's in meetings
20 and communicating with people and has nothing to do with her
21 role as litigation counsel.

22 When she said to Mr. Levandowski, "I think you should
23 actually talk," what role was she playing?

24 **MS. DUNN:** She was very clear that she was not
25 providing legal advice --

1 **THE COURT:** To Mr. Levandowski. What role was she
2 playing?

3 **MS. DUNN:** She was -- at that meeting, she was just an
4 attendee.

5 **THE COURT:** No, you're not --

6 **MS. DUNN:** She was there listening -- so, Your
7 Honor --

8 **THE COURT:** Ms. Dunn.

9 **MS. DUNN:** Okay.

10 **THE COURT:** What role was she playing?

11 She's Uber's head of litigation. She's in that meeting.
12 And she's telling -- Mr. Levandowski is not a stranger. He is
13 an executive of Uber. She's sitting in a meeting. You have
14 the head of litigation with two executives of Uber talking
15 about facts relevant to Uber's litigation implications. And
16 Uber's argument is that is not a privileged conversation.

17 That is a dangerous argument because Uber is in a lot of
18 litigations. And now their opposing counsel is going to come
19 in and argue in all these litigations that's not privileged.
20 Uber said it's not privileged.

21 I really wonder if they've thought that argument through.

22 **MS. DUNN:** Well, I believe they have thought the
23 argument through. We've discussed this with Ms. Padilla. She
24 did not consider her presence there to render the
25 communications privileged.

1 **THE COURT:** What role was she playing when she said
2 that to him?

3 **MS. DUNN:** So Ms. Padilla was obviously involved in
4 the events of this case as a fact witness. And, in fact, she's
5 on the list to be deposed as a fact witness. And the law is
6 clear that when you're talking about in-house counsel,
7 sometimes there are business objectives for a meeting and
8 sometimes the lawyer is being called upon to provide their
9 legal advice.

10 **THE COURT:** And what was the business objective of
11 this meeting?

12 **MS. DUNN:** The business objective was for
13 Mr. Kalanick, the CEO, to talk to Mr. Levandowski about what
14 had happened here.

15 **THE COURT:** And why was that a business objective as
16 opposed to a litigation objective?

17 **MS. DUNN:** Well, one thing that was happening at the
18 time is that there was an obvious question about what should
19 happen to Mr. Levandowski. And Mr. Levandowski's decision
20 to -- or impending decision at the time to take the Fifth was
21 considered to have -- and I think this makes sense -- to have
22 business consequences for the company.

23 **THE COURT:** So is Uber saying that all their
24 conversations, then, within Uber about whether to fire
25 Mr. Levandowski are not privileged?

1 **MS. DUNN:** We're not saying --

2 **THE COURT:** Their business judgment, it's not
3 privileged. That is what you're saying.

4 **MS. DUNN:** No, that's not what --

5 **THE COURT:** That's why, Ms. Dunn, the hair splitting
6 you're doing here is just -- it's jaw dropping. It's jaw -- I
7 just have to tell you, it's jaw dropping. You're a fine
8 attorney. I'm shocked.

9 **MS. DUNN:** I appreciate -- I appreciate what Your
10 Honor is saying.

11 **THE COURT:** Just to get this statement in -- which, by
12 the way, is classic hearsay to boot and probably wouldn't come
13 in anyway. Like, to do that, I just don't understand.

14 What is the case? I know the cases. I'm very familiar
15 with the cases. Usually, of course, it's the party that had
16 the conversation that's trying to make it privileged and the
17 business things.

18 I'm not aware of any case, any case where you have the
19 head of litigation, in-house -- this is not a business
20 attorney/transactional attorney -- the head of litigation
21 sitting there and having those facts.

22 So what case would I read? Because you didn't cite any in
23 your letter brief that have facts similar to this.

24 **MS. DUNN:** I'd agree that the facts of this case are
25 very unusual. But the cases are clear that the speaker has to

1 be speaking for the primary purpose of seeking legal advice
2 from the attorney.

3 **THE COURT:** Okay. So Ms. Padilla then, so what she
4 learned in that conversation then, right, so -- so then Uber,
5 several months later, has made a big deal of it. And
6 Ms. Padilla had nothing to do with that? Had nothing to do
7 with that?

8 She didn't bring it to anyone's attention? She didn't
9 say, "This is an issue we should raise, it could be relevant"?
10 She didn't learn anything in that meeting that then had any use
11 in the litigation? She never gave any advice that had anything
12 to do with what she learned in that conversation?

13 Because, well, she'll have to testify to it at her
14 deposition because that conversation wasn't privileged;
15 therefore, she can testify as to, well, then, did you ever give
16 any advice about that conversation and what you learned in that
17 conversation?

18 **MS. DUNN:** Your Honor, there's been no waiver of
19 Ms. Padilla's legal advice. Our position --

20 **THE COURT:** No, you're saying she was not in that
21 meeting and had no purpose for legal advice. She wasn't a
22 lawyer, she was not a lawyer in that meeting. She was -- I
23 don't know what she was.

24 And when she said to Mr. Levandowski, I think you should,
25 you know, answer the questions or testify, that had nothing to

1 do with Uber and its case with Waymo even though, of course,
2 it's completely in Uber's interest, she wasn't saying that as
3 Uber's lawyer and head of litigation? She wasn't advising the
4 executive of Uber, This is what I think you should do on behalf
5 of Uber? That was not any legal advice whatsoever?

6 **MS. DUNN:** Well, she specifically said she was not
7 providing legal advice.

8 **THE COURT:** To Mr. Levandowski in his personal
9 capacity. That's what she says. "In his personal capacity."

10 **MS. DUNN:** On this issue.

11 **THE COURT:** Yes.

12 **MS. DUNN:** That he was counseled.

13 **THE COURT:** Is it your position, then, that the
14 only -- that a corporation doesn't have a privilege with
15 respect to its advice that it gives its own executives as to
16 what it believes its executives to do?

17 **MS. DUNN:** My position --

18 **THE COURT:** He was an executive at the time. No, no,
19 no. Is that your position, that a corporation does not -- its
20 conversations, its in-house lawyer's conversations with
21 executives giving advice for the corporation's benefit is not
22 privileged?

23 **MS. DUNN:** Our position is that you have to look at
24 the specific circumstances. And that's what the case law says,
25 that -- and obviously the Court has a lot of discretion here,

1 but to take into account the facts and circumstances of the
2 specific communication.

3 And to be fair to us, this is what we have done
4 throughout. There are documents produced in this case where
5 Ms. Padilla is on them, where Ms. Yoo is on them, and they're
6 not considered to be privileged communications because the
7 communication is not for the purpose of asking for legal
8 advice.

9 **THE COURT:** Okay. So let me ask again. So
10 Ms. Padilla, when she's deposed and is asked then, what you
11 learned in that conversation played no role, you played no
12 role, so she had no role involved in, hey, you know,
13 Levandowski said -- by the way, do Mr. Levandowski's attorneys
14 agree that that conversation was not privileged?

15 **MS. DUNN:** The conversation between Ms. Padilla,
16 Mr. Kalanick, and Mr. Levandowski?

17 **THE COURT:** Yes.

18 **MS. DUNN:** I have not asked them that question.

19 **THE COURT:** So don't you think that's an issue?

20 **MS. DUNN:** Well, it may be an issue for them because
21 one thing that's possible is that Mr. Levandowski chose to
22 waive the privilege he had with his lawyers.

23 The question is different as to whether --

24 **THE COURT:** He hasn't chosen to waive anything.

25 **MS. DUNN:** That's also very fair in the context.

1 **THE COURT:** He hasn't chosen to waive anything. And I
2 would guess that he won't. And I would wonder how his
3 attorneys feel about -- in any event, I think that's an issue
4 because when we look at -- well, in any event.

5 **MS. DUNN:** As a matter of professional courtesy, we
6 did call their attention to the filing, of course. But from --
7 Mr. Levandowski's privilege with his counsel does not equate to
8 Uber's privilege with their counsel.

9 **THE COURT:** Yes. You can waive it. You can waive it.

10 **MS. DUNN:** We can waive Mr. Levandowski's privilege.

11 **THE COURT:** No, you can waive your privilege; right?
12 Uber's in-house head of litigation had a conversation with
13 Mr. Kalanick and Mr. Levandowski immediately after -- Ms. Dunn,
14 you must know how this looks. You can't -- you can't be
15 surprised, right, that that's the Court's reaction.

16 **MS. DUNN:** I do respect the Court's reaction, Your
17 Honor, obviously. This is a position that is consistent with
18 how we would look at all communications because the purpose of
19 this meeting was a conversation between the CEO and an
20 executive.

21 **THE COURT:** Then why was Ms. Padilla there?

22 **MS. DUNN:** And what I'm telling you is that
23 Ms. Padilla is in, as she says in her declaration, tons of
24 meetings at Uber. Not all of them are meetings that she would
25 consider privileged just based on her presence.

1 **THE COURT:** Yes, but this was a meeting about the
2 litigation. This was a meeting that was generated by something
3 that happened in the litigation. This is not unrelated. This
4 is completely intertwined with the litigation. And, in fact,
5 Uber is now trying to use the meeting in the litigation.

6 **MS. DUNN:** I understand. I understand that, Your
7 Honor. I think that, as are reflected in other documents that
8 have been produced in this case -- and when Waymo wants to
9 argue for production of these documents this is what it says,
10 so we should all recognize that -- that there are
11 communications where an attorney is present, and maybe even
12 will have a comment, that their presence does not render it
13 attorney-client privileged unless the speaker of the statements
14 is seeking legal advice from the lawyer.

15 And that is -- that's the law in Waymo's brief. That's
16 the law -- we don't object that that's the law.

17 **THE COURT:** So Mr. Kalanick wasn't seeking -- so
18 Ms. Padilla wasn't there to provide any legal advice
19 whatsoever? Like, what she learned, go in and out because her
20 role wasn't there for the purpose of any -- why was she there?
21 What was the role that she was playing? You still have not
22 answered that question.

23 **MS. DUNN:** Well, I have -- I have answered -- I will
24 try again to answer that question.

25 **THE COURT:** No, you haven't. You said she goes to

1 lots of meetings.

2 **MS. DUNN:** She does.

3 **THE COURT:** Why was she at this meeting? Why?

4 **MS. DUNN:** Well, one reason, which is what I believe
5 to be the case -- and she can be deposed on this -- is that she
6 is a person of comfort generally to the CEO. And she is
7 present at meetings that are -- the purpose of which is not to
8 seek her advice as legal counsel and her position as legal
9 counsel. They were not asking her advice. This meeting really
10 wasn't about her or her presence.

11 **THE COURT:** A lawyer at a meeting in which they don't
12 give advice but they are learning information which they will
13 then use to give advice is not privileged? Not privileged
14 because she's not actually given advice at that moment. Not
15 privileged?

16 **MS. DUNN:** I believe that that's the case because the
17 speaker -- the case law is entirely clear.

18 **THE COURT:** Okay. We'll have to revisit a lot of
19 stuff, then, in this case. Not privileged. Not privileged.
20 Not privileged.

21 So the lawyer's there gathering information. So --

22 **MS. DUNN:** Well, then how --

23 **THE COURT:** So all conversations that she's had with
24 Mr. Kalanick, gathering facts, not to give advice about it,
25 she's just gathering the facts, not privileged. So when she's

1 deposed, she can talk about it?

2 **MS. DUNN:** You have to look -- as the case law says,
3 you do have to look at the facts and circumstances of the
4 specific communication. That's why every document in the case
5 is looked at to figure out is it privileged.

6 There are documents that include lawyers, or lawyers, in
7 fact, have something to say, but they're not -- nobody is
8 seeking their legal advice and they're not offering legal
9 advice. That's the thing that we're supposed to specifically
10 look at.

11 And drilling down on this conversation, that is what was
12 going on is, she was present. But if all we have is her
13 presence, it does not --

14 **THE COURT:** We don't have her presence. Her presence
15 was for a purpose. What was the purpose of her presence? To
16 give comfort to Mr. Kalanick. How was she giving comfort to
17 Mr. Kalanick when she told Mr. Levandowski, purportedly, that
18 he should actually testify?

19 **MS. DUNN:** Well, the question really is, is that -- is
20 she offering legal advice when she says that?

21 **THE COURT:** Is she offering --

22 **MS. DUNN:** And our position is she's not.

23 **THE COURT:** -- legal advice on behalf of Uber? She's
24 not. That was not Uber's position?

25 **MS. DUNN:** She says, I'm not in a position -- yes,

1 obviously, it's Uber's position. And, in fact, it was --

2 **THE COURT:** She said, "I cannot provide him any legal
3 advice" --

4 **MS. DUNN:** Right.

5 **THE COURT:** -- "personally." Right.

6 So you're saying that Uber's in-house counsel can't give
7 advice to their -- to their executives as to what they should
8 do? That Uber couldn't say to Mr. Levandowski, "You know what?
9 On behalf of Uber, we'd like you to testify."

10 **MS. DUNN:** She specifically communicated, more than
11 once in that meeting, to Mr. Levandowski that she is not
12 providing him legal advice.

13 **THE COURT:** Personally, because she knew he had
14 lawyers, because -- personal lawyers. But that when she said
15 that, what was her role?

16 **MS. DUNN:** Her role --

17 **THE COURT:** What was her role when she said to
18 Mr. Levandowski that, while I could not provide -- "I agreed he
19 should just tell the Court what he did," why did she say that?

20 **MS. DUNN:** Because that's what she believed. And she
21 said, I can't --

22 **THE COURT:** She believed that as what? As Uber's head
23 of litigation. Because that was in the interest of Uber for
24 the litigation.

25 I don't know how I could even -- I don't even know how I

1 could write it and say that's not privileged. I don't even
2 know where I would begin.

3 So let me ask where I begin at the beginning. Give me the
4 case that I should read that would support your position.
5 Because I'm not aware of it.

6 **MS. DUNN:** I do not have a specific case where the
7 facts are precisely like this.

8 **THE COURT:** Not precisely. Give me something even
9 close.

10 **MS. DUNN:** All of the cases cited in the briefs.

11 **THE COURT:** Okay. That's what I'll look at then.
12 Those are the ones you say that support that position.

13 **MS. DUNN:** Your Honor, that is our position, that that
14 is, that -- I guess the other thing I would point out, Your
15 Honor, is that what Ms. Padilla said when she says, "You should
16 tell the truth," is something that Uber had by that point said
17 publicly that was not a communication, a confidential
18 communication. And that also would further support the premise
19 that it is not --

20 **THE COURT:** No, it wasn't.

21 **MS. DUNN:** -- a privileged communication.

22 **THE COURT:** It's a waiver. It's a limited waiver.
23 Uber is just trying to thread the needle here. And they want
24 to be able to get out what they want at a meeting because
25 Mr. Levandowski won't testify. Get out what they think would

1 be helpful, but keep everything else privileged.

2 That's all it is. It's very transparent. That's okay.
3 That's a litigation strategy I understand. I don't think it's
4 going to be successful in the end. I'm not at all persuaded.
5 It's not persuasive at all, in any event. If she was really
6 just there for nothing, she would say nothing.

7 But, again, I don't know why the head of litigation, who
8 immediately goes into this other meeting, why she's there. And
9 why she's there is clearly because if Mr. Levandowski had said
10 something that you didn't want disclosed, then you would make
11 the opposite argument. And you would win. You would win
12 because it is so classic attorney-client privilege.

13 But let me hear from Mr. Verhoeven.

14 **MR. VERHOEVEN:** I have nothing to add, Your Honor,
15 unless you have some questions.

16 **THE COURT:** No.

17 So I'll go back and I'll look. I think it's probably -- I
18 mean, it's a unique situation. I've never been confronted with
19 it.

20 Whose burden is it, by the way, to show that it's
21 privileged? I think it's probably yours.

22 **MR. VERHOEVEN:** No. It's the person asserting the
23 privilege.

24 **THE COURT:** But they say it's not; right? So if
25 that's it, then they haven't met their burden because they say

1 it's not. So it has to be your burden. Otherwise, they --

2 **MR. VERHOEVEN:** I'd have to go look at the specifics.

3 Generally, the person asserting privilege has to --

4 **THE COURT:** I understand. That's why I'm saying it's
5 a unique situation. Normally they're not the ones sitting
6 there saying it's not privileged.

7 They're saying it's not privileged. And so it's their
8 burden. They haven't met it. Therefore, it's not privileged.
9 So it would have to be yours.

10 **MR. VERHOEVEN:** If you want us to submit a brief that
11 outlines the principles you're talking about, we'd be happy to
12 do that.

13 **THE COURT:** I mean, Ms. Dunn says the cases that they
14 cited are the ones. So I think I can look at them and see then
15 if they're privileged or not.

16 What I'm more interested -- and this is actually where I
17 think the rub is -- is the scope of the waiver. So what is
18 your position?

19 **MR. VERHOEVEN:** Two things. I think the scope is
20 Mr. Levandowski's reasons for downloading the files.

21 **THE COURT:** That he ever said?

22 **MR. VERHOEVEN:** Yes.

23 **THE COURT:** Even in the meetings where his counsel was
24 there?

25 **MR. VERHOEVEN:** That's right.

1 **THE COURT:** Okay. So here's the problem. I think
2 you're probably right that that would be within the scope of
3 the waiver. But the problem we have is that at this point in
4 time there is clearly a common interest. Mr. Levandowski is in
5 some meetings and his counsel are present as well as
6 Ms. Padilla. Only this time she's actually playing the role of
7 in-house counsel. I'm sorry, I just -- I just am
8 flabbergasted.

9 In any event, Uber, I don't believe, can waive
10 Mr. Levandowski's privilege. So what I think that means though
11 is there can be no waiver in fairness. That -- that Uber is
12 not allowed to waive the privilege and, therefore, that
13 conversation with Ms. Padilla and Mr. Levandowski and
14 Mr. Kalanick cannot come in at all. In fairness. Because if
15 you can't do the full scope of the waiver then it's being used
16 as a sword and a shield at the same time.

17 Do you see what I'm saying?

18 **MR. VERHOEVEN:** Oh, you're saying you would exclude
19 the entire conversation?

20 **THE COURT:** Yes. Because it's only fair, right, if
21 they're allowed to put in -- waive and put in what
22 Mr. Levandowski said in that one meeting about why he
23 downloaded, it's only fair, right, that the waiver extend to
24 everything he said to Uber about why he downloaded the files.

25 The problem is, some of those statements were done in the

1 context of -- where his own attorneys, personal attorneys were
2 present, were done in the context of the litigation, again,
3 were privileged.

4 And I don't believe that Uber can waive Mr. Levandowski's
5 personal privilege. So that's the problem that we have. And
6 so we'd have to hear from Mr. Levandowski's counsel. As
7 Ms. Dunn said, he may waive. Unlikely. But he may not.

8 Why isn't that the result? Certainly, it's not fair that
9 this one narrow thing gets to come in, which may not come in
10 anyway because it's hearsay. But putting that aside --

11 **MR. VERHOEVEN:** May I answer? Formulating my answer.

12 So what they said, basically, in the declaration and in
13 the argument is there is no common interest. They've said that
14 they said to him, "We're not giving you legal advice." And
15 there's no privilege between Mr. Levandowski --

16 **THE COURT:** So in that meeting I'm talking about -- so
17 obviously that conversation, they waived.

18 **MR. VERHOEVEN:** Right.

19 **THE COURT:** Right? You get all the testimony. Nobody
20 can object. What Mr. Kalanick said, what Mr. Levandowski said,
21 what Ms. Padilla said, it all comes in. They said that
22 conversation is not privileged.

23 What I'm talking about are the other conversations. We
24 know from Ms. Padilla's declaration, and we think from maybe
25 Mr. Kalanick's, that Mr. Levandowski's personal attorneys then

1 showed up.

2 **MR. VERHOEVEN:** Right.

3 **THE COURT:** Right?

4 **MR. VERHOEVEN:** Yes.

5 **THE COURT:** That evening. And there were more
6 meetings.

7 **MR. VERHOEVEN:** Right.

8 **THE COURT:** Again, in the same continuum, only this
9 one wasn't privileged. But more meetings.

10 I don't believe that Uber can waive Mr. Levandowski's
11 privilege with respect to those meetings.

12 **MR. VERHOEVEN:** Well --

13 **THE COURT:** As to what he said.

14 **MR. VERHOEVEN:** A couple of points. The point I was
15 trying to make was -- just talking about this meeting; I'll get
16 to the other meetings -- that their position is there was no
17 common interest at that meeting. So what Levandowski said
18 would necessarily be a waiver of the privilege under their
19 argument. In other words --

20 **THE COURT:** A waiver of whose privilege?

21 **MR. VERHOEVEN:** Of his privilege.

22 **THE COURT:** Well, I can't adjudicate that without
23 having his lawyers.

24 **MR. VERHOEVEN:** Okay. So our position is, anything on
25 those subject matters that he talked about, there's two things.

1 There's why he downloaded the files and what -- whether or not
2 they should be taking the Fifth Amendment, and their attempt to
3 persuade him not to, according to them.

4 And those are the two subjects that -- we're not asking
5 for everything in the world.

6 **THE COURT:** Yeah.

7 **MR. VERHOEVEN:** Just those two narrow subjects that
8 they've -- I mean, they've already put it out into the media
9 repeatedly. It's obviously some PR campaign they have as well
10 as a defense. And, you know, I'm not sure that they can take
11 that back.

12 So Your Honor was suggesting that the ruling would be no
13 discussion about those subjects --

14 **THE COURT:** I'm just playing it out. I agree, I
15 think -- I'll hear from Ms. Dunn why the waiver wouldn't extend
16 just to those two areas. That's what the conversation was
17 about.

18 I know you disagree it's privileged, but --

19 **MS. DUNN:** Can I go back half a step?

20 **THE COURT:** Yes.

21 **MS. DUNN:** So one thing I want to address, Your Honor
22 is asking about the cases. The cases also say that the
23 communications have to be for the primary purpose -- not just
24 the purpose, the primary purpose of seeking legal advice from
25 the lawyer.

1 And even if Your Honor disagrees with us, which is a
2 position that we maintain, that nobody in that room was seeking
3 legal advice from Ms. Padilla --

4 **THE COURT:** And you're welcome to make that argument
5 to Judge Alsup.

6 **MS. DUNN:** Right. I think there's no question that --
7 or at least we would argue that there's no question that the
8 primary purpose of this meeting was not to seek legal advice
9 from Ms. Padilla. The primary purpose of this meeting was a
10 conversation between Travis Kalanick and Anthony Levandowski.

11 And, incidentally, the only communications that have been
12 testified to by Mr. Kalanick, that Mr. Verhoeven says is a
13 waiver, are communications Mr. Kalanick made to Mr. Levandowski
14 and Mr. Levandowski made to Mr. Kalanick. So --

15 **THE COURT:** So what --

16 **MS. DUNN:** So that's what Mr. -- that is -- that was
17 the purpose of the meeting, as Mr. Kalanick testified and is
18 supported by what actually happened at the meeting.

19 So I would like to just point Your Honor's attention to
20 the cases which do definitively say the primary purpose of the
21 meeting has to be seeking legal advice from the lawyer.

22 So even if Your Honor rejects our position in the first
23 instance, which seems very likely --

24 **THE COURT:** You're good at reading people.

25 **MS. DUNN:** I get that a lot.

1 This is a meeting that was not -- the primary purpose of
2 which was not to seek legal advice from Ms. Padilla.

3 **THE COURT:** But it had nothing to do with the
4 litigation. I find that incredible.

5 It was completely related to the litigation. It was -- it
6 was instigated by the litigation. It resulted from the
7 litigation. It was to learn facts. It was to learn facts
8 related to the litigation so that Mr. Kalanick could get advice
9 from his lawyers about how to proceed in the litigation,
10 including whether we fire Mr. Levandowski. What do we do with
11 Mr. Levandowski? Including trying to convince Mr. Levandowski
12 to testify because that will help us in the litigation.

13 **MS. DUNN:** I'm not taking the position that it had
14 nothing in the world to do with litigation. I'm not taking
15 that position.

16 I'm taking the position, supported by the case law, that
17 the presence of the lawyer does not equal privileged
18 communication. And the speakers of the statements would have
19 to be making them for the primary purpose of seeking her legal
20 advice, which they were not in this circumstance.

21 **THE COURT:** Okay.

22 **MS. DUNN:** On the question at hand, on the issue of
23 scope, first of all, we would argue that there has been no
24 purposeful waiver here. If there is any waiver, it's
25 inadvertent. So under 502, waiver --

1 **THE COURT:** How is it inadvertent? I mean, it may
2 be -- you know, maybe -- how is it inadvertent?

3 There was clearly -- clearly, in advance of that
4 deposition a strategic decision was made that Mr. Kalanick
5 would be allowed to testify as to that conversation and no
6 other.

7 **MS. DUNN:** Because we --

8 **THE COURT:** So it wasn't inadvertent. It may have
9 been incorrect in terms of -- or it was a strategic decision
10 because Uber believed that it could convince the Court that
11 that conversation was not privileged. But it wasn't
12 inadvertent. It was intentional.

13 I read -- I read, in fact, the entire transcript from the
14 beginning to the end because I had a long plane flight. And so
15 it wasn't inadvertent. I mean, you were clearly prepared.

16 **MS. DUNN:** It was inadvertent because we had a
17 good-faith basis to believe that this was not a privileged
18 conversation.

19 And in anticipation of Your Honor asking this question, we
20 did look up and find a case which is basically -- obviously,
21 nothing is exactly similar facts, but very similar
22 circumstances, where the Court held -- this case is out of the
23 Northern District of Illinois. I can get you the cite. Where
24 the Court held that because there was a good-faith belief that
25 it was a not-privileged conversation, as we do have, and

1 Ms. Padilla's declaration reflects this, that that does not --
2 that means that any waiver was inadvertent and doesn't fall
3 under 502.

4 **THE COURT:** Do you want to take the waiver back then?

5 Take it back then. You now know that I think it was
6 privileged. They don't want it to come in anyway. Just take
7 it back. I'll give you that choice.

8 You can't have it both ways. You can't get the waiver and
9 say, oop, it was a mistake, but I still get the statement out
10 there.

11 So right now you can take it back. Assert the privilege,
12 and then these statements won't come in.

13 **MS. DUNN:** Your Honor, I'm not --

14 **THE COURT:** If you can't do that, that means it's an
15 intentional waiver because I have now given you that
16 opportunity. It's not inadvertent.

17 I've given you my ruling. I'm giving you the opportunity
18 to take it back. Say, no, we assert the privilege.

19 No, you're not. I understand it's an intentional waiver.

20 Okay. So now let's talk about the scope.

21 **MS. DUNN:** Okay. So as to scope, it sounded actually
22 like this may be an area where we are in alignment with the
23 Court.

24 I'm not completely sure, so let me see if that's true,
25 which is that any scope would be limited to Mr. Levandowski's

1 statements about what he did and why he took the Fifth as
2 opposed to any communications within Uber between -- among
3 counsel discussing the general issue of --

4 **THE COURT:** No, I think it's why. I think that's what
5 Mr. Verhoeven said. What he said about why he downloaded the
6 files, about why he's pleading the Fifth, and whatever was said
7 back to him about that.

8 **MS. DUNN:** Right. Mr. Levandowski's statements and
9 responses to Mr. Levandowski's statements.

10 **THE COURT:** Correct.

11 **MS. DUNN:** Yes.

12 **THE COURT:** All right.

13 **MS. DUNN:** I agree with the Court.

14 **THE COURT:** Okay.

15 **MS. DUNN:** I don't know that -- that's not what I'm
16 hearing Mr. Verhoeven say.

17 **THE COURT:** I don't know.

18 Isn't that what you just said?

19 **MR. VERHOEVEN:** Pardon?

20 **MS. DUNN:** It was unclear from the briefing, in my
21 view.

22 **MR. VERHOEVEN:** Our position, Your Honor, is there's a
23 subject matter waiver as to those items. So they've -- they
24 picked what they like and they've proffered that. And I
25 disagree that it was unintentional. And they're hiding behind

1 the privilege as to other privileged communications on that
2 subject.

3 **THE COURT:** Like?

4 **MR. VERHOEVEN:** Like maybe they had something they're
5 hiding behind the privilege that's inconsistent with what
6 Mr. Kalanick says.

7 **THE COURT:** No. No. Anything that Mr. Levandowski
8 said is waived.

9 **MR. VERHOEVEN:** Exactly. So --

10 **THE COURT:** So they can't hide behind the privilege on
11 that.

12 **MR. VERHOEVEN:** You're right. Anything he said.

13 **THE COURT:** Yes.

14 **MR. VERHOEVEN:** But if they're claiming privilege on
15 things that reflect what he said, the reasons why he downloaded
16 it --

17 **THE COURT:** Yes.

18 **MR. VERHOEVEN:** -- then that's waived.

19 **THE COURT:** No -- yes, they agree.

20 **MR. VERHOEVEN:** It's not just the meeting. It's the
21 subject.

22 **THE COURT:** No, no, no, it's not just the meeting.

23 **MR. VERHOEVEN:** Right.

24 **THE COURT:** They agree.

25 **MR. VERHOEVEN:** And the same thing with the Fifth

1 Amendment.

2 **THE COURT:** They agree.

3 **MS. DUNN:** Here's the point, potentially, of
4 disagreement. If Mr. Levandowski goes to another meeting and
5 says, "Here's why I did this" --

6 **THE COURT:** Yes.

7 **MS. DUNN:** -- that would be within the scope.

8 **THE COURT:** Yes.

9 **MS. DUNN:** If an Uber lawyer emails outside counsel,
10 says, "I want to discuss this in the context of the
11 litigation," that would not be within the scope.

12 **THE COURT:** I think that's right.

13 **MS. DUNN:** Okay. I just want to be completely clear
14 about that.

15 **THE COURT:** Yeah. But what's in the scope is
16 everything that Mr. Levandowski said at any time.

17 Now, here's the rub. We have to have Mr. Levandowski's
18 attorneys here because I would guess that they're going to
19 object that Uber can't waive his privilege.

20 And then what we have is then, I think -- I'll allow you
21 guys to submit further submissions on it -- is that then,
22 therefore, as a matter of fairness, that conversation that
23 Mr. Kalanick testified, and Ms. Padilla, does not come in.

24 **MS. DUNN:** Why would that be?

25 **THE COURT:** Because then it's being used as a sword

1 and a shield. It's not -- it's not fair.

2 Uber is trying to essentially limit the subject matter
3 away. Not trying, but Mr. Levandowski is preventing the full
4 subject matter waiver.

5 What you're basically doing then is cherrypicking. Well,
6 he said this, and this can come in, and this other stuff can't
7 come in.

8 And that's not fair. That's not getting to the truth.
9 Either you get it all or you get it none.

10 **MS. DUNN:** First of all, we are not trying not to get
11 to the truth. I think I -- I think Uber has an interest, I
12 would think we all would have an interest in hearing what
13 Mr. Levandowski said.

14 **THE COURT:** No, that's exactly why Ms. Padilla said
15 that, because it was in Uber's interest.

16 **MS. DUNN:** Waymo, by the way, is fighting tooth and
17 nail to keep out an explanation that there is evidence to
18 support and that Mr. Levandowski said he did what he did.

19 And I think that they stand hear saying, We're in search
20 of truth --

21 **THE COURT:** Can you tell me why it comes in? Like,
22 why isn't it hearsay? Because it's clearly being offered for
23 the truth of the matter.

24 **MS. DUNN:** We have strong hearsay arguments that we
25 would like to separately brief rather than have me do it

1 ad hoc --

2 (Unreportable simultaneous colloquy.)

3 **MS. DUNN:** -- at this hearing.

4 **THE COURT:** It seems like it could all be much ado
5 about nothing because it wouldn't come in anyway.

6 **MS. DUNN:** But to your question, which is --
7 Mr. Levandowski's position, or his lawyer's position on his
8 privilege is not the same as Uber's position.

9 So if Your Honor finds that Uber has waived, then Uber
10 witnesses can testify as to what Mr. Levandowski said and what
11 they said back. And that's what --

12 **THE COURT:** But what if Mr. Levandowski objects?
13 We've had that. In fact, we have it in spades at the moment.

14 **MS. DUNN:** I agree.

15 **THE COURT:** So they couldn't; right? Because, as I
16 know now, because I've spent a lot of time on this, that when
17 you're parties to a common-interest agreement, one party can't
18 waive the privilege of the other.

19 You can't waive Mr. Levandowski's privilege. So if he
20 says he's had meetings with his -- at least with his personal
21 counsel present, I imagine his counsel would say even in other
22 meetings when they weren't present but with Uber's lawyers,
23 whether it be inside or outside counsel, that Uber can't waive
24 it.

25 **MS. DUNN:** I don't see how that would prevent Uber

1 from -- understanding our position is, it's not privileged.
2 But if Your Honor says it is, I don't understand how that would
3 prevent Uber from waiving its own privilege over what it knows
4 because Mr. Levandowski told us.

5 **THE COURT:** Okay. If --

6 **MS. DUNN:** There's a separate issue --

7 **THE COURT:** Okay. We'll have briefing on that. And
8 if everything that Mr. Levandowski told Uber comes in then,
9 fine, then there isn't a problem.

10 I guess what I'm saying is, I don't think I can make that
11 ruling without having given Mr. Levandowski's attorneys the
12 ability to weigh in, in making that decision.

13 **MS. DUNN:** And what I would say, at least at this
14 point, before we know what is going to happen, is that there is
15 a difference between a meeting that Mr. Levandowski's attorneys
16 asked to be covered by a common-interest privilege and a
17 meeting that did not contain those attorneys, where
18 Mr. Levandowski told Ms. Padilla and Mr. Kalanick what he did.
19 And --

20 **THE COURT:** No, I understand that. The question is,
21 as a matter of fairness, --

22 **MS. DUNN:** Right.

23 **THE COURT:** -- the subject matter waiver goes beyond
24 that meeting. Right? It's not fair.

25 You'd have to agree for the evidence to be only what

1 Mr. Levandowski said in that one meeting, but what he said in
2 all the other meetings can't come in, that's not fair. That's
3 a limited waiver; right?

4 **MS. DUNN:** Why would -- why would the Uber employees
5 not be able to testify?

6 **THE COURT:** Because --

7 **MS. DUNN:** They should be able to testify as to that
8 subject matter.

9 **THE COURT:** If they can, great. What I'm saying is,
10 my understanding is that Mr. Levandowski may be able to come in
11 and say, "You can't because you're waiving my privilege."
12 That's what I'm saying.

13 Because my understanding is -- and I know this was quoted
14 to me at length in earlier briefing -- was that one party can't
15 waive another party's privilege when they have a
16 common-interest agreement. At least as to that party's
17 communications.

18 **MS. DUNN:** That party's communications.

19 **THE COURT:** Right.

20 **MS. DUNN:** I mean, but the Uber witnesses would be
21 free to testify to what they knew and what they said.

22 **THE COURT:** But maybe not to what Mr. Levandowski
23 said. That's what we have to figure out.

24 And what I'm alerting you to is, if that's the case, that
25 creates a problem in which I think the result may be that then

1 the earlier waiver can't happen as a matter of fairness. I
2 don't know.

3 **MS. DUNN:** We have to brief it.

4 **THE COURT:** Yeah.

5 **MS. DUNN:** I would find it surprising that that would
6 mean that you couldn't have a waiver over a separate
7 conversation.

8 That would -- I would be very surprised if a party that
9 says we have a common-interest agreement over a particular
10 discussion can prevent the other party from testifying to a
11 different conversation because they say that there's a common
12 interest when, incidentally, even the topic is not -- they're
13 not aligned on the specific subject matter.

14 **THE COURT:** What do you mean?

15 **MS. DUNN:** So if the subject matter is Anthony
16 Levandowski taking the Fifth Amendment --

17 **THE COURT:** Yeah.

18 **MS. DUNN:** -- there's not specific alignment on the
19 subject matter.

20 **THE COURT:** You're not saying there's not a
21 common-interest privilege?

22 **MS. DUNN:** No, I'm not saying that.

23 **THE COURT:** There's a long privilege log.

24 **MS. DUNN:** I know. We've definitely been down that
25 road.

1 **THE COURT:** Okay.

2 **MS. DUNN:** I'm not saying that.

3 **THE COURT:** Well, in any event, I need -- I think what
4 we need to do -- and I don't believe that Mr. Levandowski's
5 attorneys are available at the moment, but what we're going to
6 need to do is have -- I need to have Mr. Levandowski's
7 attorneys weigh in.

8 So first what I'll do is I'll do an order addressing
9 whether I believe there's a waiver or not. I'll go back and
10 look at those cases again. But I'm unlikely to change my mind.
11 I do think that it was privileged and it was --

12 **MS. DUNN:** Can I say one other thing on this topic?

13 **THE COURT:** Yeah.

14 **MS. DUNN:** I mean, you -- I have correctly picked up
15 on Your Honor's views.

16 There was discussion also in this -- in this deposition
17 and in general throughout this litigation of the all-hands
18 meeting where Angela, head of litigation, or Ms. Padilla, head
19 of litigation, was going to come and, in fact, she was going to
20 speak. And there's discussion about that. And nobody
21 questions that we consider that to not be a privileged meeting
22 and communication. And there are emails that have been
23 produced about the all hands.

24 And I really would encourage Your Honor, because I know
25 that -- I know what you've said. But from our point of view,

1 we have a very good-faith basis for believing this is not a
2 privileged communication based on the fact -- and Your Honor's
3 own orders have talked about we have to look narrowly at the
4 privilege, it has to be a primary purpose, people have to be in
5 the communication, it is the communication that is at issue,
6 specifically seeking legal advice from this person in her
7 capacity.

8 So we are not -- let me tell you that all hands
9 explanation about he worked from home, we didn't selectively
10 waive that. That -- we looked at that and said it's not
11 privileged. It's not privileged. Nobody is seeking her legal
12 advice in this circumstance.

13 We did the same thing here. Now, yes, we do believe
14 people should know the truth about what Anthony Levandowski
15 said. And given the aggregation of evidence, this explanation
16 has the ring of truth to it. So, yes, we do want the jury to
17 hear that he said this because we believe it's supported by
18 many other things and that it's true.

19 But we have looked at a whole raft of communications in
20 this case, document by document, and looked at these meetings
21 and assessed the nature and the circumstances of the event,
22 which obviously Your Honor gets to do as the arbiter.

23 But, you know, the primary argument that we have heard
24 from the other side and the only thing they adduced at the
25 deposition is just an attorney was in the room. And the case

1 law is really clear about that.

2 **THE COURT:** No, but she submitted --

3 **MS. DUNN:** Right.

4 **THE COURT:** -- a declaration. And I just -- I mean,
5 her telling him that he should testify had nothing to do with
6 the litigation. It wasn't giving -- it wasn't any legal
7 advice. It had nothing to do with her role as litigation
8 counsel. She wasn't there in her role as litigation counsel.
9 She never used any of the information that she gathered at that
10 meeting as litigation counsel. Her purpose wasn't there to
11 learn facts she would then use to give advice as litigation
12 counsel. I can't draw any of those inferences?

13 When you say to look at the circumstances, and the
14 circumstances point absolutely to it being for the purpose --
15 maybe not that very minute to give legal advice, although she
16 was, in fact, giving legal advice when she said to him, "You
17 should testify," that was legal advice. Not to him personally,
18 but on behalf of Uber, as Uber's in-house counsel, "You should
19 testify" because that is in Uber's interest.

20 **MS. DUNN:** What Your Honor is then saying, just to --
21 you may disagree, but what it sounds to me like what Your Honor
22 would then be saying is that actually no waiver occurred at
23 Mr. Kalanick's deposition.

24 The point at which you would believe that we waived is
25 when Ms. Padilla submitted her declaration saying, "I think you

1 should testify."

2 **THE COURT:** No, it's not when she submitted her
3 declaration. It was at the deposition when you allowed
4 Mr. Kalanick to testify to it. It's not when, "I've learned
5 the facts of the meeting."

6 **MS. DUNN:** Well, he didn't -- but he didn't testify to
7 anything that Ms. Padilla said. So if what we're talking
8 about --

9 **THE COURT:** No, but the question is whether the
10 meeting itself is privileged. What was the purpose of the
11 meeting; right?

12 And the purpose of the -- and what I'm finding is the
13 purpose of the meeting was to gather facts that then would be
14 used in litigation. And that's why Ms. Padilla was there.

15 And, frankly, there's nothing in here, nothing in here
16 that says why she was there. It very astuciously avoids saying
17 why she was there, why the head of litigation was there. And
18 of course that's why she was there. Of course that's why, so
19 she could learn the facts.

20 What is Mr. Levandowski going to say? Because all this
21 has implications for the litigation, which is why we then,
22 immediately then, had all these meetings all night with all
23 these different people that were going on.

24 **MS. DUNN:** I guess my question is what is -- whether
25 we're supposed to assess privilege based on a

1 meeting-by-meeting metric --

2 **THE COURT:** Yes.

3 **MS. DUNN:** -- or if we're supposed to look at the
4 communications.

5 And the communications here, that we have, are
6 Mr. Levandowski saying what happened, Mr. Kalanick reacting to
7 that and pressing him, and then a statement by Ms. Padilla.

8 And I don't know -- if the -- if what the Court is saying
9 is that Ms. Padilla's statement about her view that that is a
10 non- -- that that's a nonprivileged communication --

11 **THE COURT:** No. What I'm saying is it's evidence.
12 It's evidence of the circumstances of the meeting of why she
13 was there. She didn't say why she was there. That is evidence
14 of it. That's all. It's not some triggering device. It's
15 simply evidence.

16 **MS. DUNN:** And I guess then our position is under the
17 case law very clear her primary purpose would have to be to be
18 providing legal advice. And I think there's --

19 **THE COURT:** And I can't think of any other purpose for
20 her to be there as head of litigation.

21 I know what you said. It's not in her declaration. And
22 it doesn't make any sense to me either.

23 **MS. DUNN:** Right. But then why would she be on any
24 email or in any meeting?

25 I mean, equally -- there has been plenty of emails

1 produced in this litigation that obviously have to do with
2 litigation because they've been produced through the
3 litigation, and she is on them or Salle Yoo is on them. And
4 then why -- we don't just look at that and say, well, the
5 primary purpose of this must be seeking legal advice.

6 So it can't be that Angela Padilla encases everything in
7 privilege. That can't be. Then -- then we have disclosed
8 countless privileged communications in this case. And I don't
9 think that's true. I don't think Waymo would say that's true
10 either.

11 **THE COURT:** Okay. All right. So I'll do that. And
12 then I'll do the order on that because that's the first
13 question.

14 And then when that order comes out, then maybe the parties
15 with Mr. Cooper can work out, you know, a briefing schedule on
16 the scope of the waiver and then include Mr. Levandowski's
17 attorneys in that as well. Because I imagine that they --
18 well, they do need to be heard on that since it involves --

19 **MR. VERHOEVEN:** Your Honor, so just so we don't have
20 to brief it, I would -- I'm assuming you will treat this issue
21 the same as your prior order yesterday.

22 We have 15 business days until the cutoff. If this
23 process doesn't get completed, if there's another appeal to the
24 Federal Circuit that, notwithstanding the cutoff, we would be
25 entitled to take the discovery if it's affirmed or if -- if the

1 end result is that there's a waiver of documents to be
2 produced --

3 **THE COURT:** Yeah. So that's Judge Alsup discovery
4 cutoff. So I can't purport to do anything with that. So I
5 work as fast as I can. I'm working with the parties in that
6 way.

7 I would be surprised, because something was up on appeal
8 and if it ultimately was affirmed, that you wouldn't get the
9 discovery. For example, if the Federal Circuit rules after
10 August 24th, which is quite possible, I would be surprised if
11 the discovery cutoff is gone. But it's not my problem.

12 **MR. VERHOEVEN:** Got it.

13 **THE COURT:** All right. Thank you.

14 **MR. VERHOEVEN:** Thank you, Your Honor.

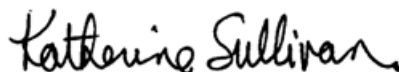
15 (At 10:00 a.m. the proceedings were adjourned.)

16 - - - -

17 **CERTIFICATE OF REPORTER**

18 I certify that the foregoing is a correct transcript
19 from the record of proceedings in the above-entitled matter.

20 DATE: Wednesday, August 9, 2017

21
22 

23
24
25 _____
Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter